No. 89-1760

Supreme Court, U.S.
FILED
JUN 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IMMUNO, A.G.,

Petitioner,

vs.

JAN MOOR-JANKOWSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE STATE OF NEW YORK

REPLY MEMORANDUM FOR THE PETITIONER

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Reply Memorandum for the Petitioner

This reply to Moor-Jankowski's Brief in Opposition is filed because Moor-Jankowski has, for the first time, argued that the Court of Appeals decided this case on state, not federal, grounds.

Moor-Jankowski has, until now, argued that the U.S. Constitution requires that he win his motion for summary judgment; only now has he discovered a preference for state sources of protection. The Court of Appeals focussed almost exclusively on the federal constitution. At most, the Court of Appeals casually mentioned New York's constitution twice, in passing. Appendix pp. 5, 11. Indeed, in the first passage cited, the Court of Appeals emphasized the *federal* sources of the fact/opinion distinction underlying its decision, citing *this* Court's decision in *Gertz v. Robert*

Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (which the Court of Appeals viewed as first elevating the fact/opinion dichotomy to federal constitutional levels). Appendix at 5.

Moor-Jankowski is not the first litigant to grasp at that particular straw, and this Court has reacted to such tactics by heavily restricting the circumstances under which it will find adequate independent state grounds. In *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), this Court held that a passing mention of state sources was not enough:

> "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. *Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believes that federal law required it to do so.* If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent

> grounds, we, of course, will not undertake to review the decision."

463 U.S. 1032, 1040-41 (emphasis supplied).

If the decision below was founded on adequate independent state grounds, the New York Court of Appeals would have said so. That is exactly what it did in *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y. 2d 521, 523 N.E. 2d 277, 528 N.Y.S. 2d 1 (1988), where it said:

> "Our decision is based on an adequate and independent ground under our State Constitution."

71 N.Y. 2d 524. Far from supporting Moor-Jankowski's contention, *O'Neill* shows that the New York Court of Appeals did *not* have state law anywhere near the forefront of its consciousness as it rendered the decision appealed from—that if state law played any part, it is nevertheless thoroughly "interwoven" with the United States Constitution and this Court's decisions interpreting that Constitution.

Moor-Jankowski also argues that this Court should not review the decision below because it decided factual issues under New York procedure. This new argument misconstrues the question posed by this petition. The question is not whether the Appellate Division, on which the Court of Appeals relied and Moor-Jankowski here relies for a statement of facts, got those facts wrong. Manifestly it did (which will come out on the appeal if certiorari is granted); but what Immuno wants this Court to review is whether, as the Appellate Division and the Court of Appeals insisted, the First Amendment to the U.S. Constitution *mandates* that a court determine, and not just identify, jury issues regarding truth or falsity prior to trial, where a published expression of opinion is based upon a published factual predicate, and there is evidence upon which the predicate could be found false.

The statement that Immuno proposes to conduct itself in a way which will spread Non-A/Non-B hepatitis (by releas-

ing rehabilitated chimpanzees to the wild—Appendix pp. 83, 99, 100) was premised on the factual statement that there is no test to determine whether a chimpanzee, having been exposed to the disease, is a carrier capable of infecting others. However, Moor-Jankowski knew such a test existed and was not unrealistic or impracticable, *because he used it himself.* (Appendix at 95; *see also* Appendix pp. 76-77, 88.)

This Court should grant certiorari to consider whether the First Amendment permits or requires a court to usurp the jury's function by finding a predicate statement to be true even though the court (in the same paragraph) recognizes that there is a basis for finding the predicate factual statement to be false. (Opp. Br. pp. 2-3.)[1]

Moor-Jankowski is simply wrong in denying that this is a mixed-opinion case. This case directly raises the question, what is the burden of proof of falsity of a factual assertion, where that assertion is the predicate for a defamatory opinion?

Immuno's burden to demonstrate falsity is of *federal* constitutional dimension. This Court so held in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986). That burden having originated with this Court, it is appropriate that this Court, and not the New York courts, set the precedent on what, before trial, that burden consists of.

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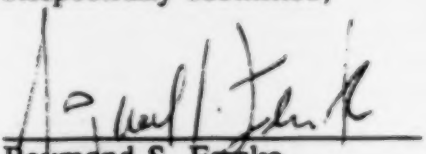
[1]Thus, while acknowledging that there was a test which does determine whether a chimpanzee is infectious, and that Immuno's proposal was to use it, the lower court anomalously found that "there is no way to determine that an animal is definitely not a carrier of the disease". . ."with potential to spread non-A non-B hepatitis in West Africa." Appendix pp. 100, 98.

Conclusion

For these reasons, and for those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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